

MINUTES

**MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 12, 1999 at 9:00 A.M., in Room 325 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Duane Grimes (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter McNutt (R)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 60, SB 124, SB 152,
1/9/1999
Executive Action: SB 24

HEARING ON SB 124

Sponsor: SEN. TOM BECK, SD 28, Deer Lodge

Proponents: Dan Anderson, Administrator of the Addictive and Mental Disorders Division, Department of Public Health and Human Services

Andrea Merrill, Mental Health Association of Montana

Sandra Mihelish, National Alliance for the Mentally Ill of Montana (NAMI)

Opponents: None

Opening by Sponsor:

SEN. TOM BECK, SD 28, Deer Lodge, introduced SB124 which generally revises the laws relating to mental health. The purpose of this legislation is to update Montana's current mental health statutes so they better reflect actual practices within the system and the changes that have taken place over the years due to reorganization of state government and the welfare reform. This legislation may affect a small number of non-residents committed to the state hospital and inmates in need of mental health evaluation and treatment. It is the intent of the legislation that several influences and processes required under current law be eliminated. Mental health facilities are required to notify all county welfare departments of a patient prior to discharge for the purposes of determining whether financial assistance is required. The legislation will no longer require the department to submit a biannual report to the government. A provision of the legislation will allow inmates to be transferred from the Montana State correctional facilities to mental health facilities for up to ten days for the purposes of evaluation and treatment. The 30 day commitment for non-residents to the state hospital will be eliminated. The legislation also clarifies the screening requirement for mental health arrests for minor misdemeanors. An amendment in Section 4 clarifies that screening is required for individuals who may require commitment.

Proponents' Testimony:

Dan Anderson, Administrator of the Addictive and Mental Disorders Division, Department of Public Health and Human Services, remarked that the legislation clarifies language, removes unnecessary requirements, and helps assure that certain groups of individuals will receive the mental health services they need. He presented written testimony, **EXHIBIT(jus08a01)**.

Andrea Merrill, Mental Health Association of Montana, provided her written testimony, **EXHIBIT(jus08a02)**, in support of SB124.

Sandra Mihelish, National Alliance for the Mentally Ill of Montana (NAMI), submitted written testimony on behalf of Mitzi Anderson, President of NAMI, **EXHIBIT(jus08a03)**.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. BARTLETT remarked that the legislation repeals a section of law dealing with maintenance of indigent patients on discharge and this specifically requires the county welfare department in the county from which the patient was committed to ascertain if the discharge patient is in financial need and, if so, is required to properly care for and maintain the discharge patient under the laws relating to public assistance until the patient is able to care for himself or another provision has been made for the care of the person. She wanted to make sure that when this language is eliminated, the addition of the language on page 4, line 7, requiring the hospital to provide referrals for financial assistance will be sufficient to address this issue. **Mr.**

Anderson stated that currently a determination is made of what the patient is entitled to and his or her needs according to the programs which are available. There is no special program for Montana State Hospital discharge patients. The added language may be stronger in that the person handling the discharge is asked to individually determine what the patient needs rather than make a form letter referral to the welfare department.

SEN. JABS questioned whether there was difficulty in returning non-residents to their home state. Also, is it necessary to keep these patients for a long time. **Mr. Anderson** affirmed that there is a problem returning people to their home states which may take well beyond 30 days. Montana subscribes to the Interstate Compact on Mental Health which involves transfers between states. They want to be able to keep non-residents in the state hospital until they are ready to be discharged either somewhere in Montana or in another state.

CHAIRMAN GROSFIELD commented that Section 7 may have a fiscal impact in the program for transition. **Mr. Anderson** responded that they are not proposing any additional funds for additional services. There may be the instance where a person is to be discharged to a local nursing home but the nursing home is hesitant to treat the person due to behavior problems. They would have staff consult with the nursing home. On a limited basis, this wouldn't involve additional costs.

Closing by Sponsor:

SEN. BECK summarized that the purpose of the legislation is to try to make the system work better.

{Tape : 1; Side : A; Approx. Time Counter : 9.30}

HEARING ON SB 60

Sponsor: SEN. HALLIGAN, SD 34, Missoula

Proponents: Ed McLean, Missoula District Court Judge
Al Smith, Montana Trial Lawyers Assoc.

Opponents: Jane Jelinski, Montana Association of Counties

Opening by Sponsor:

SEN. HALLIGAN, SD 34, Missoula, provided a copy of Rule 53, **EXHIBIT(jus08a04)**. He added that SB 60 attempts to codify the existing rule that allows the appointment of standing masters. There is some concern of the potential fiscal impact on local governments. In issues such as irrigation, family law, tax law, workers' compensation, etc., courts need the ability to appoint a standing master to address these issues.

Proponents' Testimony:

Ed McLean, Missoula District Court Judge, remarked that in the early 1990s there was approximately a two year wait in Missoula County for a contested divorce to be heard. When he assumed the bench, he appointed a special master to help clear up the domestic relations calendar. It now takes 90 to 120 days to bring a contested domestic relations matter to a conclusion. The benefits of the program is that it takes into account the primary interests of the child by addressing the family turmoil. The focus is on the family needs and getting the anguish of the domestic dispute behind the parties. It is not the intent of this legislation to put any unfunded mandates to the county commissioners. They are agreeable to a requirement that if such a position were created, it would be done with an agreement of the county commissioners.

Judge Larson uses his standing master to help with mental health problems and preliminary criminal matters. Most of the judges who utilize a special or standing master do so in the areas of domestic relations. This has greatly alleviated their calendar and will delay the need for an additional judge in the future.

Al Smith, Montana Trial Lawyers Assoc., rose in support of SB60. He attested that his bill will benefit the individual Montana citizens and businesses who end up in court. The longer the delay in setting a trial date, the more stress that is imposed upon the parties.

Opponents' Testimony:

Jane Jelinski, Montana Association of Counties (MACo), stated that the legislation is a good idea but the potential unfunded mandate requirement is not acceptable to counties. The fiscal note states that the judge would confer with the commissioners about the budget but the proposed legislation simply states that this must be paid for by the counties served by the district courts.

{Tape : 1; Side : A; Approx. Time Counter : 9.37}

Questions from Committee Members and Responses:

SEN. JABS remarked that the language in the legislation did not provide that the judge needed to receive approval from the county commissioners for payment of a standing master. **SEN. HALLIGAN** responded that the language states that payment is to be made by the county served by the district court. It doesn't state that there needs to be an agreement. They would be interested in addressing MACo's concern about whether a judge could order this without an agreement from the county commissioners.

SEN. JABS questioned whether this would involve only one person being appointed as a standing master. **Judge McLean** stated that they use one person as a standing master.

SEN. JABS stated that there are three judicial districts that have a caseload of over 1300 cases per judge. There is legislation for additional judges in these districts. He questioned whether a district with a smaller caseload would use a standing master. **SEN. HALLIGAN** stated that Ravalli County is looking into asking for a new judge. Judge Lankton has indicated that with a standing master he could relieve a tremendous amount of the caseload.

CHAIRMAN GROSFIELD remarked that language in Section 5 of the bill stated that the unfunded mandate was superceded. The unfunded mandate statute, Section 1-2-114, states that a bill may not be introduced enacting a new law requiring direct expenditure for local government without a specific means to finance the activity. **Ms. Lane** stated that this section is referred to as the Drake Amendment. Last session new requirements were added and one of the requirements is that a bill cannot be introduced that would create unfunded mandates unless funding to cover the cost is provided in the bill. There is an exception which states

that the legislation can provide that this requirement is being superceded. That is why the language is contained in this bill.

CHAIRMAN GROSFIELD further remarked that the fiscal note stated that 13 districts may hire standing masters. He questioned whether that was a realistic number. **SEN. HALLIGAN** responded that he disagreed with the fiscal note. A potential amendment would allow the concurrence of the county commissioners and then a fiscal note would not be needed. **Judge McLean** explained that the Governor's Office requested information from various districts and the fiscal note reflects the counties that expressed an immediate interest in utilizing a standing master. He added that there has been a study which has indicated that three areas need an additional district judge. This legislation is intended to curb the future needs but does not address the three proposed judges. This would give relief in the areas with heavier caseloads.

CHAIRMAN GROSFIELD questioned whether an amendment that would make this subject to the approval of the county commissioners would address the concerns of MACo. **Ms. Jelinski** stated that MACo could support the bill if that provision was inserted.

SEN. BARTLETT remarked that Rule 53, under the appointment of compensation of masters, indicates that the compensation for those persons could be charged to the parties of the cases that are referred. She asked **Judge McLean** if this was the process in Missoula County. **Judge McLean** explained that their standing master is a full-time county employee and is paid by the county.

SEN. BARTLETT questioned whether he would have any objection to having the county charge the parties involved for the use of a standing master. **Judge McLean** stated that is a feasible way to fund the program. It could also be used as a portion of the funding.

Closing by Sponsor:

SEN. HALLIGAN remarked that with respect to having the parties involved pay for a standing master, most of his clients couldn't afford this. Rule 53 is comprehensive with respect to the appointment of special masters and standing masters. When the Supreme Court was asked about the need for this bill, they preferred that it was in statute. Reducing delays in the trauma associated with court actions is absolutely critical.

{Tape : 1; Side : B; Approx. Time Counter : 9.54}

HEARING ON SB 152

Sponsor: SEN. JACK WELLS, SD 14, Bozeman

Proponents: R. Stephen White, Montana Coalition of Home
Educators
Laurie Koutnik, Christian Coalition of Montana
Cathy Collins, Citizen
Heleen Omsberg, Concerned Citizens of Three Forks
Suzanne Crawford, Citizen
R. Inez Howeth, Citizen

Opponents: Lance Melton, Montana School Boards Association
Eric Feaver, Montana Education Association and
Montana Federation of Teachers
Loren Frazier, School Administrators Association
Christine Kaufman, Montana Human Rights Network
Geraldyn Driscoll, Office of Public Instruction
Rebecca Moog, Montana Women's Lobby
Ed McLean, District Judges Association
Sandy Oitzinger, Montana Juvenile Probation
Officers Association
Bob Vogel, Chairman of Helena School Board and
Montana School Boards Association

Opening by Sponsor:

SEN. JACK WELLS, SD 14, Bozeman, introduced SB152. He remarked that he would like to amend the title to change the word "declaring" to "recognizing" so that the bill would read "An act recognizing that the right of parents to direct the upbringing of their children is a fundamental right." The fundamental right of parents to raise their children is inherently a God given right and the state should recognize that right. The index of the Montana Codes contains four pages of rights. Nowhere is there any indication of parent's rights. The growing number of private and charter schools, home schoolers, and the amount of legislation across the nation on vouchers and tuition tax credits indicates that there is a growing concern on the part of parents and families that their rights are either not recognized or somehow being sidestepped. This legislation will state in law parent's fundamental rights. Section 2 includes the areas that are covered as well as what is not covered by this legislation.

{Tape : 1; Side : B; Approx. Time Counter : 9.57}

Proponents' Testimony:

R. Stephen White, Montana Coalition of Home Educators, presented his written testimony in support of SB 152, **EXHIBIT(jus08a05)**. Michigan, Kansas and Texas have passed similar measures. Recently in Bozeman a survey was forced upon persons living in the area. Fortunately, Paula Butterfield, School Superintendent, stood firmly in opposition to the survey.

Laurie Koutnik, Christian Coalition of Montana, presented her written testimony in support of SB 152, **EXHIBIT(jus08a06)**.

Cathy Collins, Citizen, rose in support of SB 152.

Heleen Omsberg, Concerned Citizens of Three Forks, remarked that she was a part of a large number of parents who were concerned about a class their children were taking. They tried to work this out with the school board. This resulted in a trial setting. There was an appointed jury and the parents presented their evidence, written and with witnesses. The teachers presented their side and then addressed points that the parents had made. The parents felt that their civil rights were violated. Some parents are afraid to speak up if they disagree with a school issue because they may be labeled and their children might be treated negatively in school. She requested that a copy of SB 152 be given to every school district from the Office of Public Instruction.

Suzanne Crawford, Citizen, remarked that a comprehensive literacy study undertaken by the U.S. Department of Education reveals that nearly half of all adult Americans cannot read and write sufficiently to be able to get and keep a good job. It also shows that more than half of all high school graduates were found to have restricted abilities in math and reading. She is asking for an assurance that parents will retain their roll as the decision makers in their children's education.

{Tape : 2; Side : A; Approx. Time Counter : 10.18}

R. Inez Howeth, Citizen, commented that recognizing that parents have the right to direct the upbringing of their children is not only fundamental, it is essential. Parents are irreplaceable. A survey by the U.S. Department of Education showed that teachers believe the most important issue in educational policy is strengthening the role of parents in children's education. A child's most important need is to have a loving parent who will serve as the protector of that child's rights. The parent's right bill does not give parents an absolute right. No one has the right to abuse and neglect their child. This will not weaken in any way, existing criminal penalties and other sanctions against child abuse and neglect. This legislation sends a

message to public officials that parents have legal standing and a message to parents that parental responsibilities must be fulfilled.

Opponents' Testimony:

Lance Melton, Montana School Boards Association, presented written testimony in opposition to SB 152, **EXHIBIT(jus08a07)**. They strongly support parental involvement in the educational process and the individual parent's right to make decisions in the upbringing of their child. Schools are run by their locally elected school boards. Public schools need to find the best way possible to educate all the community's children according to the interests of that community and to incorporate the interest of the individual parent to whatever extent possible. There are alternatives in the law provided for home schooling children and for enrolling in non-public schools. School board members who are not responsive to community needs are voted out of office and are replaced with more responsible community members who are elected to run the schools in the way that the community wishes for the schools to be run.

Mandates are provided under federal law for special education. They are underfunded and the state is left with a problem. Most federal law is based on a provision that states that schools have to provide an appropriate public education to the special education students. This is very similar to a parent's right to direct the education and upbringing of the child under Section 2, (1) (b) of this bill. This legislation could mean providing specific curriculum that is individually tailored to every student and each parent's wishes. This is impossible in the public school system.

Eric Feaver, Montana Education Association and Montana Federation of Teachers, rose in opposition to SB 152. He believed this legislation was an open invitation to bring lawyers into every act of a school district. This will do nothing to prevent the alleged or real abuses that may have occurred in Three Forks as presented in earlier testimony. It is dubious that SB 152 will do anything about the quality of public education. He didn't know what it would mean for the state to endorse something called "reasonable corporal punishment" in a parent's relation with a child.

Loren Frazier, School Administrators Association, stated that the vagueness of the bill could cause a lot of litigation. In states where this type of legislation has passed, it is called a lawyer full employment act. The provision regarding reasonable corporal

punishment is of concern. Montana's Supreme Court recently overturned the rule of reasonable and prudent. Every parent that has been accused of abuse feels that they were justified in what they did, regardless of how far it went. Teachers and administrators are to report abuse.

Christine Kaufman, Montana Human Rights Network, commented that we all believe that families should provide for the physical and emotional needs of children and should direct the upbringing of children to be productive and responsible citizens. We all know families that are not successful in doing so. If those families are left to their fundamental rights without appropriate attention from society, these families will cause even greater harm to their children. Society has an interest in the healthy growth and education of children who will become the adult citizens of our communities. This bill's impact on child welfare agencies, state and local laws, and public education demands very close scrutiny. Establishing parents' rights as fundamental rights will greatly impede the state's ability to take action when a child is endangered in their own home. This legislation would create chaos in the public schools when dozens of parents, exercising their fundamental rights, all demand that the same 5th grade teacher provide a different curriculum for their child. What about parents who don't care whether their children read or not.

Geralyn Driscoll, Office of Public Instruction, rose in opposition to SB 152. This legislation encourages division in our communities and ultimately will divert scarce public dollars away from education and into litigation.

Rebecca Moog, Montana Women's Lobby, raised a concern regarding Section 2(b) which states that parents have a fundamental right in making health care decisions for their children. This could jeopardize an adolescent's health. If a sexually active adolescent contracts an STD and is afraid or unwilling to confide in their parents, they would fail to get the proper medical treatment resulting in sterility or more severe problems. Sexually active adolescents might fail to seek out contraception if they needed a parent's permission to do so. Those adolescents that feel they can go to their parents regarding these issues will do so without a law that requires them to do so in order to receive medical care.

Ed McLean, District Judges Association, raised a concern regarding a divorced couple giving a school opposing direction as to the education of their child. Another concern is the havoc that would be created when one parent, in violation of a court order, took a child to another jurisdiction and held that under

SB 152 he or she, as the parent of the child, had the right to do so. This legislation would do absolutely nothing to clarify any rights of the family or the child.

Sandy Oitzinger, Montana Juvenile Probation Officers Association, rose in opposition to SB 152. They are concerned about the effects of this legislation on status offenses and the log jams that would be created in the court system.

Bob Vogel, Chairman of Helena School Board and Montana School Boards Association, admitted that they do go through very difficult times when trying to adopt curriculum in any school district in Montana. The process works well. Parents, members of the community, teachers, and administrators are all involved in the process.

{Tape : 2; Side : A; Approx. Time Counter : 10.38}

Questions from Committee Members and Responses:

SEN. GRIMES remarked that his understanding is that the parenting laws in a divorce situation would dictate which parent had the authority over the child's education. **Judge McLean** stated that in nine out of ten parenting plans both parents are given the authority to make the determination regarding the education of the child. In the event they disagree, they can seek court action. This also includes medical treatment of the child in the absence of an emergency treatment.

SEN. GRIMES added that there is proposed legislation to address parenting plans. If this has been left out, it should be made a consideration by the arbitrator. **Judge McLean** stated that a problem in this area prior to the last session was that the parent who had the residential custody of the child would be making the educational decisions without input from the non-residential parent.

SEN. BISHOP questioned whether this legislation needed to be balanced by considering the rights of the children. Also, responsibility of the parents needs to be delineated. **SEN. WELLS** agreed that the rights of children was a consideration. He added that there is a general understanding among parents that they know their responsibilities.

SEN. BARTLETT asked if there were concerns in the child protective services function of the Department of Public Health and Human Services. **Shirley Ternon, DPHHS,** stated that their concern is that Section 2(b) delineates acting in a manner that constitutes abuse or neglect of children as being precluded.

Section 3 restates that state or local government does not have the right to usurp the parent's right. Those two statements are diametrically opposed. Children's rights are absolute fundamental rights and parent's rights are contingent upon their responsibility to provide for the rights of children to be safe and protected. The word responsibility should be used in the legislation. On the highway, we don't know what the word "reasonable" means. It may mean leaving just small marks on an eight month old child.

SEN. GRIMES asked **Mr. Frazier** if he could provide examples of litigation from other states that had similar legislation. **Mr. Frazier** agreed to provide the information.

SEN. GRIMES asked for the view of the American Civil Liberties Union. **Scott Crichton, ACLU**, stated that their mission is to defend the Constitution and the Bill of Rights. He reviewed the legislation and did not see a violation or reduction of rights.

SEN. JABS raised a concern that this legislation may give too much power to a poor parent. He also asked whether present law protected the rights of parents. **SEN. WELLS** did not believe the legislation would give any additional rights to bad parents. Many state organizations look into child abuse. If these parents are taking liberties with their children, they will continue to do so with or without this legislation. He found nothing listed in current law as "parents' rights".

SEN. HALLIGAN questioned whether the intention of the legislation was to change the standard of showing reasonable cause to suspect to a compelling state interest. **SEN. WELLS** stated that was not his intention. The intention is to put the rights of the parents on record for parents and school officials.

SEN. HALLIGAN stated that since fathers were being left out of decisions for their child, the joint custody statute was passed. Many parenting plans include a joint custody provision which includes medical, educational, and religious decisions of the child. We have a 50% divorce rate. In most of the difficult cases, the parents do not agree on these issues. This would result in many of these issues being addressed in the court system.

SEN. WELLS responded that currently parents have fundamental rights. This legislation would be used more often when the school has done something that was not appropriate.

SEN. DOHERTY questioned what direction would be given to the courts by declaring something a fundamental right. He especially

questioned the level of scrutiny that would be used to examine an action. **Judge McLean** stated that when someone claims a fundamental right, one of the first things that is done is to make sure that they have the services of an attorney to represent them, whether they can afford it or not. Secondly, it is necessary to determine whether the proper procedures have been used to address the issue. Parents currently have fundamental rights. He added that he didn't see how this legislation would change the procedure that the courts would follow other than to make it far more encumbering.

CHAIRMAN GROSFIELD remarked that the bill contains general language. Section 2(1)(a) states that this right includes but is not limited to directing or providing for the education of children. He asked how this would work in a public school system. **Mr. White** stated that many parents have a deep distrust of the public school system. This legislation raises the issues of rights to a fundamental right. As Chairman of the Montana Coalition of Home Educators, he receives numerous calls from parents who have been told by a social worker that their child was not being properly educated and the child would be taken away from them if they didn't show up at certain meetings, etc. Usually, the parents give in and lose the opportunity to home school their child because they were afraid of the controversy and could not afford legal assistance. If the state were forced to show a compelling interest before they intervened with the rights of the parents, there may be more restraint.

CHAIRMAN GROSFIELD remarked that the bill stated that it was to be codified in Title 40, Chapter 6, Part 2. Part 2 is the obligations of parents. Section 40-6-211 says the parent or parents of a child shall give the child support and education suitable to the child's circumstances. He believed that this gave parents the right to make decisions regarding the child's circumstances. **SEN. WELLS** stated that Section 1(a) did not put anything new into law. He wanted this to be codified under the rights section to provide guidelines for parents, school officials and other state organizations for the kinds of things that the parents were responsible for and had a right to do.

Closing by Sponsor:

SEN. WELLS stated that regarding the survey mentioned earlier, the rights of parents were very grievously overlooked by attempting to put a survey like this out to school children. This legislation is an attempt to prevent problems instead of cause problems. He is surprised that the representatives of the school system objected so strongly to this legislation when they keep indicating that they want to improve the relationship with

parents. He is not aware of any evidence of chaos in the judicial system in other states with similar legislation. The bill address good families and good parents. There will always be bad families and bad parents. There are plenty of rules to address that situation. This legislation is not an attempt to undermine the public school system but instead it is an attempt to try to help improve the situation in the public schools.

EXECUTIVE ACTION ON SB 24

Motion: SEN. HALLIGAN MOVED TO AMEND SB 24. (SB002402.av1
EXHIBIT(jus08a08) .

Discussion:

SEN. HALLIGAN explained that this addressed the issue that the arresting officer could not be the one who potentially could be appointed as the part-time probation officer.

MS. LANE added that the request by MACo was that the last sentence of the bill be reworded in a positive statement as opposed to a negative statement. The title was also changed to be more positive.

Vote: Motion to amend carried unanimously, 9-0.

Motion/Vote: SEN. HALLIGAN MOVED THAT SB 24 DO PASS AS AMENDED.
Motion carried unanimously, 9-0.

EXECUTIVE ACTION ON SB 63

Motion: SEN. DOHERTY MOVED TO AMEND SB 63. (SB006301.av1
EXHIBIT(jus08a09)

Discussion:

SEN. BARTLETT questioned whether this amendment would require anyone convicted of incest, when the victim was less than 12 years old and the offender was at least 15 years old, to be subject to lifetime registration as a sexual offender.

CHAIRMAN GROSFIELD explained that his understanding is that this is federal law and the amendment would make the state law consistent with federal law.

SEN. GRIMES stated that he did not have a grasp on the philosophy of lowering the age. He questioned why the same action would not be taken on an offense that would occur with a 13 or 14 year old with a 16 or 17 year old committing the offense.

SEN. DOHERTY withdrew the motion.

ADJOURNMENT

Adjournment: 11.45 A.M.

SEN. LORENTS GROSFIELD, Chairman

JUDY KEINTZ, Secretary

LG/JK

EXHIBIT (jus08aad)